

## TESTIMONY OF ANDREW C. SPIROPOULOS

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Census, December 6, 2005

I am Andrew C. Spiropoulos, Professor of Law at the Oklahoma City University School of Law, and I offer the following testimony regarding House Joint Resolution 53. (H.J. Res. 453) My expertise is in constitutional law and the legal aspects of the legislative process; I will confine my remarks to these areas.

### **SUMMARY**

The central legal question regarding H. J. Res. 453, which seeks to amend the Constitution in order to base Congressional apportionment on the number of citizens rather than persons, is whether such an amendment is necessary or whether such a change may be made by statute. In order to answer this question with regard to aliens residing in the United States, one must consider legal and illegal aliens separately. It is my opinion that Section 2 of the Fourteenth Amendment, stating that apportionment must be based on the "whole number of persons in each State", rather than citizenship, requires that aliens legally residing in the United States be counted toward the number of persons used for apportionment purposes. The Constitution, therefore, must be amended if legal aliens are to be excluded from the number of persons counted for apportionment purposes. The Constitution, however, as demonstrated by the original understanding both of the original provision governing apportionment contained in the third clause of Article I, section 2 and section 2 of the Fourteenth Amendment, does provide the national government some discretion to determine who is truly an inhabitant of a state for the purpose of apportionment. It is my opinion that it is within the legitimate discretion of Congress to

instruct the Census Bureau, by statute, to exclude illegal aliens from the census conducted for apportionment purposes.

In addition to evidence gleaned from the records of the framing and ratification of both the Constitution of 1787 and the Fourteenth Amendment, this interpretation is confirmed by the unbroken practice of the national government. With regard to legal aliens, the government has always sought to count all inhabitants, not only citizens. It has never been disputed, either by members of government or legal commentators, that legal aliens, taking up legal residence in the United States, are inhabitants of the state in which they reside. They pay taxes, may consume the full range of government services, and, as demonstrated by the level protection afforded them under the Equal Protection Clause, are, except for the privileges directly flowing from citizenship, established members of society. This longstanding practice and understanding not only constitute evidence of the original meaning of the provisions; they should lead a reasonable court to presume that legal and political institutions and practices have been established upon the reasonable expectation that such practices, absent extraordinary circumstances, will continue.

The question of whether the Constitution requires that aliens residing illegally in the United States be counted is far more difficult. Whether illegal aliens are necessarily included in "the whole number of persons in each State" is not clearly resolved by either the original meaning of the text or the intent of the drafters. The framers of the provisions at issue did not know of or contemplate the problem of illegal immigration. We do know, however, that the framers' understanding of "persons in each State" was based on the notion that such a person was a demonstrated inhabitant of that jurisdiction.

This concept of “inhabitant” is not self defining; the legislature and the executive, operating subject to that legislature’s authority, must define it. The census taking authorities, in the past, have exercised discretion regarding, for example, U.S. military and diplomatic personnel residing overseas, foreign tourists, and foreign diplomatic personnel residing in the United States. This past practice demonstrates that the national government has always exercised some discretion regarding who qualifies as an inhabitant for the purpose of census taking.

Unlike with legal aliens, one cannot conclude that illegal aliens must be considered inhabitants of a state. Given their liability to expeditious deportation, the limited constitutional protections afforded to them, their necessary avoidance of the regular interaction between residents and government entities, and, perhaps most importantly, their refusal to consent to the fundamental laws and norms of this society, it is cannot be said that the Constitution mandates that illegal aliens are sufficiently connected to a particular state to be considered an inhabitant of it. It is certainly true that the national government has, without exception, chosen to this point to include illegal aliens in that definition. I do not offer any opinion as to the wisdom of this choice or a different one. My contention is that just as the government may decide that illegal aliens are inhabitants so it may decide that they are not. Therefore, it is my opinion that the Congress may, by statute, instruct the Census Bureau to exclude illegal aliens from the census conducted for apportionment purposes.

### **SUPPORTING ARGUMENTS AND AUTHORITIES**

The original Constitution, in the third clause of Article I, section 2, states that representatives shall be apportioned among the several States "according to their

respective numbers, which shall be determined by adding to the whole number of free Persons . . . excluding Indians not taxed, three fifths of all other Persons." This provision was amended by section 2 of the Fourteenth Amendment which states that "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State . . ." The Congressional debates regarding the Fourteenth Amendment demonstrate that the framers of that amendment meant only to revise the apportionment clause to eliminate the infamous three fifths language, preserving the existing meaning of the rest of the clause.<sup>1</sup> Thus, one must, in seeking the original meaning of the clause, look to the framers of the original Constitution.<sup>2</sup>

The evidence regarding the drafting and ratification of the original apportionment clause demonstrates that the framers intended the word "persons" to be understood as "inhabitants" of the state in question. The original language of the provision, as adopted by the Committee on Detail at the Constitutional Convention of 1787, stated both that the number of representatives shall be determined "by the number of inhabitants" and that the proportion of direct taxation "shall be regulated by the whole number of white and other free inhabitants." The final form of the language emerged from the Committee on Style; there is no evidence that any substantive revision was intended when "inhabitants" was replaced with "persons." James Madison, in Federalist No. 54, in discussing this clause,

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<sup>1</sup> One of the leading members of the Congress that drafted the Fourteenth Amendment, Rep. Roscoe Conkling, commenting on this issue, stated "the committee has adhered to the Constitution as it is, proposing to add to it only as much is necessary to meet the point aimed at." Cong. Globe, 39<sup>th</sup> Cong., 1<sup>st</sup> Sess. 359 (1866).

<sup>2</sup> Excellent discussions of these questions may be found in Charles Wood, *Losing Control of America's Future—The Census, Birthright Citizenship, and Illegal Aliens*, 22 HARV. J.L. & PUB. POL'Y 465 (1989); Jim Slattery & Howard Bauleke, *"The Right to Govern is Reserved to Citizens:" Counting Undocumented Aliens in the Federal Census for Reapportionment Purposes*, 28 WASHBURN L.J. 227 (1988); and Denniis L. Murphy, Note, *The Exclusion of Illegal Aliens From the Reapportionment Base: A Question of Representation*, 41 CASE W. RES. L. REV. 969 (1991).

also stated that the apportionment rule is "founded on the aggregate number of inhabitants." Madison, further, in the debate during the first Congress on the first census bill, referred to "the enumeration of the inhabitants." Contemporary dictionaries make clear that, to the framing generation, "inhabitant" carried the meaning of someone with a fixed, not transitory, residence, a person settled in the community.

The determination of whether a person is an inhabitant, a settled member of the community (in this case, the state) is not self-evident. Congress, both under its power under Article I to make all laws necessary and proper for carrying its powers, including that of providing for the census, and its power under section 5 of the Fourteenth Amendment to enforce the provisions of that amendment, must possess the authority to give meaning to the concept of inhabitant. Indeed, the discretion of Congress to determine the meaning of "inhabitant" in doubtful cases is illustrated by the discretion the Census Bureau has historically exercised, subject to their statutory authority, in carrying out its functions. The Bureau has determined, at one time or another, that U.S. military personnel serving overseas (and their families), foreign tourists, and foreign diplomatic personnel stationed in the United States should not be counted in the census. Clearly, then, the national government possesses some discretion to decide who should be counted in the census for apportionment purposes.

Congress should particularly possess this discretion when it comes to the treatment of illegal aliens under the clause. From the time of the framing until the enactment of the first immigration statute in 1875, the legal concept of an illegal alien did not exist. Consequently, neither the framers of the original Constitution nor of the Fourteenth Amendment could have manifested any intent regarding how illegal aliens

should be treated under the apportionment clause. Given no clear answer from the Constitution or its framers, one must look to the authority of Congress.

The extent of legislative discretion under the clause should depend upon whether excluding the group in question is consistent with the purposes of the framers in drafting the apportionment clause. Justice Joseph Story, in his Commentaries on the Constitution, stated that, at the time of the framing, there was a "considerable diversity of judgment" regarding the appropriate principle for determining the apportionment of representatives. Some of the framers believed representatives ought to be distributed on the basis of relative wealth, with wealthy states receiving more representatives. Others believed that representation should be based on the natural right of individuals to preserve their public rights and liberties and, thus, representation should be based purely on population. Framers of both views agreed to use the number of inhabitants for apportionment. Those chiefly concerned with property supported the measure because the number of inhabitants was thought the most accurate measure of the wealth of the state. Those of the individual rights perspective believed each member of the community, whether or a citizen or not, was entitled to be counted for the purpose of determining political representation. Both of these rationales support why legal aliens must be considered "inhabitants." They work, pay taxes, and thus contribute to the relative wealth of a state. In addition, they are members of the community in which they live, possessing fundamental rights and liberties that may not be abridged.

Inclusion or exclusion of illegal aliens, on the other hand, may be justified under either rationale. One could argue that, no different than legal aliens, many illegal aliens pay taxes, generate wealth, and are persons entitled to legal protections. On the other

hand, one may argue that, as they must avoid government authorities as much as possible, illegal aliens cannot and do not pay their fair share of taxes and thus do not proportionately contribute to the wealth generated by a state. One may also contend that they, by definition, do not consent to the laws and norms of our nation (and, consequently, are not afforded the same constitutional protections as other persons) and are therefore not sufficiently rooted members of the community to be entitled to even indirect representation.

In sum, Congress possesses the discretion to determine if illegal aliens are inhabitants of a state and thus must be counted for purposes of apportionment.<sup>3</sup> I venture no opinion on whether Congress ought to exercise this discretion by excluding illegal aliens from the apportionment base. It may be, for example, that there is no practical way to exclude illegal aliens without jeopardizing the accuracy of the census by, for example, causing legal aliens, fearing intrusive questions, to avoid the census. It is up to Congress to decide whether the benefits of this exclusion would be worth the logistical and political difficulties it will cause.

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<sup>3</sup> In addition, because the presence of large numbers of illegal aliens in some states may dilute the worth of votes in states with small numbers of illegal aliens, it may be argued that Congress possesses the authority under section 5 of the Fourteenth Amendment to redress this imbalance by excluding illegal aliens from the census.